UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Boris A. Miksic, Plaintiff, v. Boeckermann Grafstrom Mayer, LLC, a Minnesota limited liability company, f/k/a Johnson, West & Co. P.L.C., Boeckermann Grafstrom Mayer, P.A., and Johnson West & Co. P.L.C. Defendants.	)	Court File No. 15-cv-00539-JRT-BRT **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO EXCLUDE EXPERT TESTIMONY OF ARTHUR H. COBB**

I. INTRODUCTION

The above named defendants ("Defendants") move to exclude the testimony of Plaintiff Boris Miksic's ("Miksic") expert, Arthur H. Cobb ("Cobb"), because: (1) Cobb is not qualified to offer an expert opinion on the specific tax preparation issues involved in this litigation; (2) Cobb employs the wrong professional standards in reaching his liability and causation theories; and (3) Cobb's testimony is legally deficient, nothing more than mere *ipse dixit*, thus making it irrelevant to all of Miksic's asserted causes of action.

In this professional malpractice action, Miksic claims that the defendants were negligent and breached their professional duties in providing tax preparation services by failing to properly prepare and file U.S. tax Forms 5471, 3520 and 3520A, and TD 90.22-1 ("FBAR"). In support of his claims, Miksic offers the purported expert opinion of Cobb. While a CPA, Cobb can offer no expert testimony on the defendants' tax preparation services provided to Miksic, the professional standards governing those services, or how the defendants failed to comply with those standards.

In accordance with the *Daubert* decision and Federal Rule of Evidence 702, Cobb is not qualified to offer any liability or causation opinions on these topics. For at least the last 36 years, Cobb has focused his career on providing expert litigation services. He is the quintessential hired-gun expert. Cobb admittedly has no education, training or experience in tax preparation, including the specific forms at issue here and, as a result, he has no experience in complying with the specific professional standards governing tax preparation services, like those the defendants provided to Miksic. Cobb instead bases his opinions solely on his reading of what he considers to be the governing professional standards, his review of a limited universe of information from Miksic, and his consultations with an actual tax preparer, Mr. Gary Surdel, CPA. Surdel was not disclosed by Miksic as a potential testifying expert and did not submit any report in connection with this case. Cobb's opinions in this case, like in others in which his testimony has been excluded, are simply his unsupported say-so, and his liability and causation opinions are not properly allowed.

Accordingly, the defendants respectfully submit that the application of Federal Rules 702 and 403, with the guidance of ample supporting precedent, requires this Court to enter an order excluding Cobb's purported expert testimony in its entirety.

II. CASE DESCRIPTION AND PROCEDURAL POSTURE

To avoid duplication, the defendants incorporate by reference the overview of Miksic's claims and the lawsuit's procedural posture included in the defendant's Memorandum of Law in Support of their Motion for Summary Judgment.

Having completed fact and expert discovery, including Cobb's deposition, the defendants now move to exclude Cobb's report and testimony as inadmissible under Rules 702 and 403 of the Federal Rules of Evidence.

III. STATEMENT OF FACTS

The factual record in support of the present Motion is set forth herein and is supplemented by the factual record provided in the defendants' Memorandum of Law in Support of their Motion for Summary Judgment.

A. Plaintiff's Liability Expert: Arthur H. Cobb.

On August 17, 2015, Miksic served a Second Affidavit of Expert Review ("Second Affidavit") to support his claims against the defendants as required by Minn. Stat. § 544.42, subd. 4. (Ex. 7).[1] In this Second Affidavit, Miksic first identified Cobb as his testifying expert on issues of negligence, malpractice, and causation. (*Id.*). Miksic claimed that Cobb would opine on the applicable standard of care, namely that the defendants were required to provide their professional services in compliance with a "Standard of Care," which Miksic defined as "collectively, the [American Institute of Public Accountants] Code of Professional Conduct, Statements on Quality Control

[1] Unless otherwise identified, the Exhibits referred to in this Memorandum of Law are attached to the Declaration of Michael T. Berger in Support of Defendants' Motions.

Standards, Professional Standards, and other AICPA Standards, Treasury Department Circular No. 230, and other standards of conduct in the industry are referred to as the 'Standard of Care.'" (Ex. 7, p. 5 fn.2).

Despite Miksic's August 2015 Second Affidavit, Cobb testified at his deposition that he first reached his liability and causation opinions in early 2016 and his final opinions in February or March 2016. (Ex. 5, Cobb Dep., p. 9:5-20). On March 31, 2016, Miksic served his Rule 26(a)(2) Expert Disclosure identifying Cobb as his liability and causation expert. (Ex. 14, Cobb Ex. 85). On May 20, 2016, counsel for the defendants conducted Cobb's discovery deposition. (*See generally* Ex. 5, Cobb Dep.).

Defendants' Rule 26(a)(2) Expert Disclosure identified and included a report from Todd Taggart, CPA. (Ex. 12, Taggart Report).

1. Cobb's Qualifications.

Cobb is not a lawyer, he has not attended law school, and he was not retained to offer any legal opinions in this matter. (Ex. 5, Cobb Dep., p. 16:3-12). Cobb is a CPA.

Cobb has a Bachelor of Arts degree in Business Administration from the University of Iowa (1972) and a Master of Arts Degree, with an emphasis in accounting, from the University of Iowa (1974). (*Id*., at pp. 37:15-39:24). Cobb has no specific educational experience in tax preparation and can only recall possibly taking one undergraduate course covering general taxation issues sometime before 1972. (*Id*., pp. 23:13-24:18, 37:15-40:2). Furthermore, Cobb testified that tax preparation has not been an area of his continuing education, and he recalls attending only one tax seminar relating to foreign tax accounts and foreign investments in the last ten years. (*Id*., 42:4-11, 52:14-25).

Cobb admittedly is not a tax preparation expert. During his deposition, Cobb candidly stated: (1) he is "not a tax preparation person"; (2) he has no experience in tax preparation; (3) he has no experience in preparing or advising on the specific tax forms at issue in this litigation, including 5471, 3520 and 3520A, and FBAR forms; and (4) he only gained familiarity with the AICPA's Statements on Standards for Tax Service ("SSTS") – the governing professional standards for tax preparers – through his general familiarity with other AICPA standards. (*Id*., 31:7-12, 33:2-4, 34:4-7, 36:22-24, 37:8-14, 45:5-17, 46:20-48:3, 117:18-118:2). Cobb's opinions in this case are not based on any occupational or educational experience in tax preparation, but only upon his reading of the AICPA's standards. (*Id*., 45:5-48:3, 113:9-114:12). Cobb further testified that he had not been engaged to opine on an accountant's practice related to the preparation of personal income tax forms in at least 10 years. (*Id*., 18:6-12). He also testified that he has no expertise that would allow him to provide a definition of the reasonable effort of inquiry required for a tax preparer under either the AICPA standards or Treasury Department Circular 230. (*Id*., 113:9-114:12).

Cobb is an expert-for-hire. His primary professional focus for the last 36 years has been in providing litigation support and expert witness services. (*Id*., 6:14-17:16). In just the last four years, Cobb has provided expert trial or deposition testimony in at least 34 separate cases, including the current action. (*Id*., 39-43).

He has been employed by Cobb & Associates since 1994 and the main focus of that firm's business is in providing expert services for litigation. (*Id.*, 27:17-28:5). Cobb testified that 97% of Cobb & Associates' income comes from providing litigation services. (*Id*., 77:21-78:18). Cobb further admitted that his firm, Cobb & Associates, has been retained by Miksic's counsel for litigation and expert witness services in at least 30 different instances. (*Id*., 9:21-10:15).

Before Cobb & Associates, Cobb worked for other expert-for-hire firms since 1980. (*Id*., 28:6-29:14). And yet, despite his long history as a hired expert, there is no evidence that Cobb has ever qualified to provide expert testimony on liability or causation issues relating to tax preparation services or preparation of the specific tax forms at issue in this litigation.

Moreover, the Cobb Report indicates that he considered "discussions with other professionals" in rendering his opinion. (Ex. 14, Cobb Ex. 85, p. 36). Cobb's deposition revealed that he relied on Surdel in forming his opinions regarding the defendants' tax preparation services – the core issue in this lawsuit. Specifically, Cobb "corroborated" his liability and causation views by consulting with an actual tax preparer, Surdel, CPA, and Miksic's counsel. (Ex. 5, Cobb Dep., 266:7-267:11). According to Cobb, Surdel is a CPA who practiced as an accountant in the tax field until he recently retired from the accounting firm, Wipfli, LLP. (*Id*.). Cobb's liability and causation theories are based upon, and reflect, Surdel's input. (*Id.; see also* Ex. 14, Cobb Ex. 85, p. 36). It is undisputed that Surdel was not disclosed as an expert witness in this case, yet Cobb relied on Surdel's "observations on [the defendants' tax] preparation" in his Report. (Ex. 5, Cobb Dep., 267:12-268:3).

2. Cobb's Liability and Causation Theories.

In his report, dated March 31, 2016, Cobb provides the following summary of the opinions he plans to testify to at trial:

- [The defendants] breached the duty of care [owed to] Mr. Miksic and deviated from the standard of care owed [to] Mr. Miksic by in, among others:
- Failing to exercise due professional care, to be careful, to be thorough or to obtain sufficient relevant data to prepare and file the required IRS forms for Mr. Miksic or to advise Mr. Miksic of requirements to file IRS forms;
- Failing to prepare and file required forms;
- Failing to timely detect and correct errors in Mr. Miksic's income tax and reporting forms;
- Failing to conduct appropriate further inquiry into Mr. Miksic's foreign holdings after receiving the IRS's audit notice to Mr. Miksic on March 17, 2010;
- Failing to conduct appropriate further inquiry into Mr. Miksic's foreign accounts and holdings after receiving the IRS's April 13, 2011 notice regarding [the defendants'] failure to prepare and file a Form 5471 related to EcoCortec;

- Failing to conduct appropriate further inquiry in Mr. Miksic's foreign holdings after receiving the IRS's May 25, 2012 notice regarding [the defendants'] failure to prepare and file a Form 5471 related to Cortec Croatia; and [2]

- Failing to conduct further inquiry into Mr. Miksic's foreign holdings after receiving the IRS' letter 3084 in the summer of 2012 regarding [the defendants'] failure to prepare and file Forms 3520 and Forms 3520-A.[3]

(Ex. 14, Cobb Ex. 85, p. 33). Cobb's liability and causation theories all relate to the defendants' alleged failures in preparing and filing U.S. tax Forms 5471, 3250 and 3250-A, and FBAR for Miksic. (Ex. 5, Cobb Dep., 162:9-163:17).

As further indicated by Cobb's Report, his liability and causation views deviate from what was disclosed in Miksic's August 2015 Second Affidavit. Cobb is now claiming that the defendants failed in their professional duties owed to Miksic by not complying with the AICPA's AR § 100. AR § 100, entitled, "Compilation and Review of Financial Statements," is a former AICPA audit and review standard, and it is not a tax preparation standard.[4] (*Id*., 105:4-106:5; 109:9-14). It imposes different and more stringent requirements for financial reviews and audits than required for tax preparation services. (*Id*., 109:9-14). Cobb testified that there are no professional standards, including AICPA or Treasury Department standards, that require tax preparers to comply with AR § 100 for tax services. (*Id*., 56:19-57:6, 109:9-14).

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[2] Cobb admitted during his deposition that, after reviewing Deposition Exhibit 88, this statement was not accurate and was a misstatement. (Ex. 5, Cobb Dep., 130:21-137:21, 220:16-221:24).

[3] Cobb admitted during his deposition that he did not have any evidence to suggest that the defendants ever received the correspondence referenced in this bullet point and that this statement was also inaccurate. (*Id*., 222:16-223:8).

[4] AR § 100 was superseded in December 2010 by the issuance of Statements on Standards for Accounting and Review Services (SSARS) No. 19. AR § 100 relates to financial statement preparation and does not apply to engagements for the preparation of income tax returns. (Ex. 12, Taggart Report, p. 9). *See, e.g., In re CITX Corp.*, No. 03-727, 03-CV-6766, 2005 WL 1388963, at *4 (E.D. Pa. June 7, 2005) (describing application of AR § 100 to financial compilations and audits).

3. Cobb's Foundation and Methodology.

Cobb reached his views in this case without first getting all documents from Miksic. Cobb was not given a complete copy of Miksic's deposition with all of its exhibits. (*Id*., 172:15-173:16). Further, Cobb asked for financial records relating to Miksic's business, but those were also not provided to him. (*Id*., 79:10-23).

Cobb's liability and causation views are focused only on the defendants' preparation of US tax Forms 1040, 5471, 3520 and 3520A, and FBAR. (*Id*., 162:9-163:17). In reaching these views, Cobb relied on his reading of the Treasury Department Circular 230 sections relating to tax preparation, AICPA's SSTSs, and also his reading of AICPA AR § 100, which he acknowledges does not apply to tax services. (Ex. 14, Cobb Ex. 85, pp. 12-14; Ex. 5, Cobb Dep.,106:1-107:10, 109:9-14, 195:24-196:12).

In reaching his liability and causation views, Cobb seems also to apply his own common sense and reasoning based on his general CPA background, and not on any knowledge or experience as a tax preparer. For example, Cobb testified:

> Q: Not a problem. You mentioned that the tax preparer has to, under the tax standard, I believe, I want to make sure that I'm not misquoting you. You mentioned that the tax preparer has to conduct reasonable efforts to obtain information from the tax payer. Is that what you mentioned?
>
> A: That's under the tax standards.

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Q: What is your knowledge, training, or expertise that allows you to provide a definition of reasonable effort for inquiry for a tax preparer?

A: I'm a certified public accountant. I'm familiar with the standards, not only the general standards, audit review standards, but the tax standards. I, on numerous occasions through my career, have had the opportunity to read and analyze tax returns and disclosures made in tax returns.

Q: None of that expertise is based on your work as a tax preparer. Is that correct?

A: That's correct. I'm not a tax preparer.

Q: And then under your discussion of the Treasury Circular 230, you discussed reasonable efforts. What's your knowledge, training or expertise that gives you the ability to opine as to the reasonable efforts required to comply with Treasury Circular 230 by a tax preparer?

A: I'll give you the same answer.

Q: And none of that is based on any experience you had in preparing tax returns, is that correct?

A: It's at least generally correct.

(Ex. 5, Cobb Dep., 111:20-114:12).

B. The Subject U.S. Tax Forms.

All of the claims in Miksic's Complaint, and Cobb's liability and causation opinions, relate to the preparation of U.S. tax documents filed with the IRS and U.S. Treasury Department, including Forms 5471, 3520 and 3520A and FBAR. (*See generally*, Dkt. No. 1, Complaint; Ex. 5, Cobb Dep., 162:9-163:17).

For Example, under 26 U.S.C. §6038, a U.S. taxpayer with ownership interests in a foreign corporation may be required to file Form 5471, entitled "Information of U.S. Persons with Respect to Certain Foreign Corporations" with his or her U.S. federal tax returns. *See, e.g., Enesco Group, Inc. v. Campanaro,* No. 07 B 565, 2013 WL 4045756, at *2 (Bankr. N.D. Ill. Aug. 8, 2013).

Under 26 U.S.C. §6048, a U.S. taxpayer who owns a foreign trust is required to file Form 3520, entitled "Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts", with his or her U.S. federal income tax returns. *See, e.g., James v. U.S.*, 11-CV-271-T-30, 2012 WL 3522610, at *2 (M.D. Fla. Aug. 14, 2012). A trust owned by a U.S. taxpayer must file Form 3520A, entitled "Annual Information Return of Foreign Trust with a U.S. Owner" with the owners' U.S. federal income tax returns. (*Id*.).

Under 31 U.S.C. § 5314(a), a U.S. taxpayer with any financial interests in any bank, securities, or other financial accounts in a foreign country may be required to file Form TD F 90-22.1, entitled "Report of Foreign Bank and Financial Accounts" or FBAR, with the U.S. Department of Treasury. *See, e.g., U.S. v. Williams,* No. 10-2230, 2012 WL 2948569, at *1 (4th Cir. July 20, 2012). The FBAR must be filed on or before June 30 of each calendar year with respect to foreign financial accounts maintained during the previous calendar year. (*Id*.).

C. The Governing Professional Standards.

Defendants' expert is Todd Taggart, CPA. Taggart has over 30 years of experience as a tax partner at Grant Thornton, LLP and Cobb acknowledges that Taggart is qualified to render expert opinions in this matter. (Ex. 12, Taggart Report, p. 22; Ex. 5, Cobb Dep; 262:18-264:4). According to Taggart, a tax preparer representing taxpayers before the IRS is subject to the rules of Treasury Department Circular 230 and the SSTSs.

(Ex. 12, Taggart Report, p. 5). Taggart specifically noted that Cobb improperly applies AICPA's AR § 100 to the defendants' tax preparation services. (*Id.*, p. 9).

IV. ARGUMENT

A. Cobb's Liability and Causation Views Are Inadmissible Under Federal Rule of Evidence 702.

1. This Court's "Gatekeeper" Function under Rule 702.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702. Rule 702 provides that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify" in the form of an opinion or otherwise if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

On a *Daubert* motion, the court acts as a gatekeeper to "ensure that any and all scientific testimony … is not only relevant, but reliable." *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). The goal is to avoid "subjective belief or unsupported speculation," *Daubert*, 509 U.S. at 590, in situations in which "[t]here is simply too great an analytical gap between the data and the opinions proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The proponent of the expert testimony bears the burden of establishing the reliability and relevance of the proposed testimony. *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8th Cir. 2006). The admissibility must be provided by a preponderance of the evidence. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). Expert testimony is reliable only if the expert is qualified to render the opinion and the underlying methodology is scientifically valid. *Daubert*, 509 U.S. at 589-90; *Barrett v. Rhodia, Inc.*, 606 F.3d 975, 980 (8th Cir. 2010).

District courts have wide latitude in determining whether an expert's testimony meets the reliability requisites of Rule 702. *Olson v. Ford Motor Co.*, 481 F.3d 619, 629 (8th Cir. 2007). In assessing reliability, district courts consider such factors as: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the theory has a known or potential rate of error and whether there are standards for controlling the error; (4) whether the theory or technique enjoys general acceptance within the relevant scientific community; (5) whether the expertise was developed for litigation or naturally flowed from the expert's research; (6) whether the proposed expert ruled out other alternative explanations; and (7) whether the proposed expert sufficiently connected the proposed testimony with the facts of the case. *Lauzon v. Senco Prod.*, 270 F.3d 681, 686-87 (8th Cir. 2001); *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 449 (8th Cir. 2008); *In re Viagra Prods. Liab. Litig.*, 572 F. Supp. 2d 1071, 1077 (D. Minn. 2008). Because the reliability inquiry is necessarily fact-specific, no single standard for reliability exists. *See*

Unrein v. Timesavers, Inc., 394 F.3d 1008, 1011 (8th Cir. 2005). Instead, these factors are flexible and should be considered as the case demands. *Id*.

"In sum, the district court's gatekeeping role separates expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). "Nothing … requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co.*, 522 U.S. at 146.

2. Cobb is not qualified to render liability or causation theories in this professional malpractice case involving tax form preparation.

Cobb lacks the expertise to testify reliably regarding the professional duties to be met by tax preparers such as the defendants. "Part of this court's role as a gatekeeper is to ensure that an expert's testimony does not exceed the scope of his expertise." *Wagner v. Hesston Corp.*, No. 03-4244, 2005 WL 1540135, at *7 (D. Minn. Jan. 30, 2005), *aff'd*, 450 F.3d 756 (8th Cir. 2006) (citing *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (explaining that an expert cannot testify as to opinions outside the area of expertise)). "Rule 702 requires more than generalized knowledge of a particular subject." *Tropple v. Black & Decker, Inc.*, No. 13-CV-2907, 2015 WL 4992011, at *3 (D. Minn. Aug. 20, 2015); *see also Stallings v. Black & Decker Corp.*, No. 06-CV-4078, 2008 WL 4530695, at *7 (S.D. Ill. Oct. 7, 2008). Importantly,

> [a]n expert's qualifications must be within the same technical area as the subject matter of the expert's testimony, in other words, a person with expertise may only testify as to matters within that person's expertise. Generalized knowledge of a particular subject will not necessarily enable

> an expert to testify as to a specific subject of the general field of the expert's knowledge.

Stallings, 2008 WL 4530695 at *7. Although experts may be qualified based on experience, there must be a close relationship between that experience and the expert's opinion. *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009) (noting that a district court properly excluded testimony from a police officer relating to strip searches and civil rights violations, where officer had no experience with those matters); *see also Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) (Rule 702 requires that "the area of the witness's competence matches the subject matter of the witness's testimony."); *Garnac Grain Co. v. Blackley*, 932 F.2d 1563, 1566 (8th Cir. 1991) (affirming the district court's decision to exclude expert testimony from witnesses who lacked formal training and had only limited practical knowledge and experience in subject area at issue).

"It would be absurd to conclude that one could become an expert simply by accumulating experience and testifying." *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990); *see also Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 435 (6th Cir. 2007) (when the proposed expert is a quintessential "expert for hire," he need not be accorded a prescription of unreliability, but the party offering the expert must show some objective proof supporting the reliability of the expert's testimony); *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1175 (1st Cir. 1992) (upholding district court's exclusion of testimony by professional expert who had no experience or qualifications that would permit him to opine on the design of the current product).

Cobb is the quintessential expert-for-hire. For at least the last 36 years, Cobb's primary professional focus has been to provide expert litigation support services. He admittedly has no education, training or experience in tax preparation and has no practical experience in complying with the relevant professional standards, including the AICPA's SSTS. He has never consulted on, prepared or filed any of the tax forms at issue in this litigation, including Forms 5471, 3250, 3250A, and FBAR. His views in this case are simply based on his general experience as a CPA, which for the last 36 years has focused on providing litigation services, his readings of Circular 230, the SSTSs and AR § 100, and his consultations with, and "corroboration" from, Surdel.

Cobb's missing expertise is especially significant here, where Cobb's proffered testimony deals exclusively with matters within the field of professional tax preparation services and preparation of specific U.S. tax forms. Cobb's minimal and generalized background in this area which is based on his reading of AICPA standards and his consultations with Surdel presents more of a problem than a justification for the admissibility of his testimony. The jury may reasonably have a hard time distinguishing between a self-professed "expert" like Cobb and someone with the education, training, and experience in professional tax preparation services necessary to render such an opinion, like Taggart.[5] Notwithstanding his lack of academic credentials, formal training, or any relevant experience on Cobb's part, Miksic is proposing that the jury be permitted to accept the more or less unstudied observations and conclusions of someone who lacks the requisite qualifications to evaluate whether the defendants' breached the applicable professional standards and duties for tax preparation services like those provided by the defendants to Miksic.

Judge Tunheim's analysis in *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067 (D. Minn. 2015), is particularly instructive. In *Khoday*, the defendants identified two "eCommerce" experts, a professor of marketing and a consultant, to opine on the process of purchasing downloadable insurance software. *Id*. at 1077. The marketing professor worked in the Department of Marketing at the Leavey School of Business at Santa Clara University and the consultant had substantial experience in eCommerce, including authoring publications and consulting for Deloitte Consulting on related issues. *Id*. at 1079. The plaintiff challenged both experts, arguing in part, that they lacked adequate experience and education necessary to provide expert testimony on the specific issues involved in the litigation. *Id*. at 1077, 1080. Judge Tunheim ultimately excluded testimony from the marketing professor because he had no experience in actually downloading the software at issue. Specifically, the court held that despite his general familiarity with other software, there was no evidence the professor had any experience

[5] Cobb admits that Taggart, the defendants' expert, is qualified to give an expert opinion in this case. (Ex. 5, Cobb Dep., 262:18-264:4).

with the software at issue and no evidence that he had ever been trained in or performed the specific type of market analysis on which he sought to opine. *Id*. at 1078-79. Similarly, Judge Tunheim also excluded testimony from the consultant because his experience with online marketing and commerce did not confer upon him the specific expertise necessary to testify about the software at issue or about the process of downloading that software. *Id*. The court also held that his general background and common sense were not adequate methods or techniques for formulating specific opinions especially where he had not personally performed any software downloads or used the websites at issue. *Id*. at 1081 (*citing Wheeling Pittsburgh Steel Corp*., 254 F.3d at 715 (finding that a witness easily qualified as an expert on flood risks, but that his testimony on warehouse safety was not appropriate, given that he "sorely lacked the education, employment, or other personal practical experiences to testify as an expert" on that issue).

In other cases from the Eighth Circuit Court of Appeals, this district and others highlight the necessity for an expert to have actual educational or practical experience in the specific subject matter in order to have a reliable basis to offer an expert opinion. *See, e.g., Havenfield Corp. v. H&R Block, Inc*. 509 F. 2d 1263 (8th Cir. 1975) (in deciding to exclude expert testimony from a stock broker regarding transaction fees, the court noted that "[i]t is important that expert witnesses have experience in transactions that are as similar as possible to the transactions upon which they are being asked to comment"); *Carlson v. C.H. Robinson Worldwide, Inc.,* No. 02-3780, 2005 WL 758602, at *5 (D. Minn. Mar. 31, 2005) (wherein J. Ericksen ultimately excluded expert testimony because the plaintiffs failed to establish that their purported expert had necessary timely knowledge, skill, experience, training or education in specific workplace issues to have a reliable basis for forming opinions); *Sterner v. U.S. Drug Enforcement Agency*, 467 F. Supp. 2d, 1017, 1033-34 (S.D. Cal. 2006) (finding that the purported expert was not qualified under *Daubert* to offer testimony relating to tax burden calculations, despite passing qualifying examinations for Treasury Agent and IRS Specialized Agent positions, because he had no specialized knowledge or experience in actual tax preparation); *Sun Ins. Mktg. Network, Inc. v. AIG Life Ins. Co.*, 254 F. Supp. 2d 1239, 1245 (M.D. Fla. 2003) (finding that the forensic accountant was not qualified under *Daubert* to testify as to his expert opinion with respect to valuation of an insurance agency, where he had never appraised such insurance agencies, had no background information on long term care insurance industry, had done no work in that industry in the last 10 years, and had done no research or analysis of the long term care insurance market prior to providing valuation, except for reading some articles).

The Minnesota Court of Appeal's analysis in *Noske v. Friedberg* is also persuasive. 713 N.W.2d 866 (Minn. Ct. App. 2006). In that case, the plaintiff asserted a legal malpractice claim against his criminal defense attorney. To support his claim, the plaintiff offered an affidavit from a law professor at Hamline University School of Law, who taught primarily torts and professional responsibility. *Id*. at 870-71. In reviewing the district court's decision to exclude expert testimony, the appellate court noted that the "proposed expert must 'make a substantial showing of qualification in the particular field of inquiry.'" *Id*. (internal citation omitted). The appellate court also noted that "[p]referrably, experts should also have practical experience in the particular matter at issue." *Id*. The appellate court further noted that, although the proposed expert's knowledge of professional responsibility was likely relevant, it was unlikely the proposed expert, who had no practical or academic experience in criminal law and had only academic experience on issues of professional responsibility, could provide admissible expert testimony. *Id*. Ultimately, the appellate court concluded that the district court properly dismissed the expert's testimony and observed that while the proffered expert's "expertise in professional responsibility was arguably relevant, his lack of practical or academic experience in the criminal law area made" his testimony on the duty of a criminal defense attorney inadmissible as expert opinion. *Id*. at 872.

Here, like the proposed experts identified in the cases above, Cobb has no practical or academic experience in the critical field of inquiry, namely tax preparation and application of the governing professional standards to that work. Moreover, Cobb relied upon another individual with a tax preparation background, who is not one of Miksic's experts in this case, in formulating his opinion on the defendants' tax preparation services. Cobb's liability and causation opinions are therefore not admissible under Rule 702 and this Court properly exercises its "gatekeeper" function and excludes Cobb's testimony in its entirety.

Notably, Judges of this Court have ruled that Cobb cannot testify, or have sharply limited his opinions, based upon his unsupported views. In *Dietz v. Jacobs,* Judge Ericksen found that Cobb's opinion lacked sufficient reliability because he made totally unsupported assumptions without any underlying analysis. No. 12-1628, 2014 WL

1153502, at *12 (D. Minn. Mar 21, 2014). Similarly, in *US Salt, Inc. v. Broken Arrow, Inc.*, Judge Kyle observed that Cobb's two separate expert reports were not sufficiently reliable and "were riddled with unsupported assumptions" before excluding Cobb's testimony. No. 07-1988, 2008 WL 2277602, at *1 (D. Minn. May 30, 2008), *aff'd* 563 F.3d 687 (8th Cir. 2008). In *Cardiac Pacemakers, Inc. v. Aspen II Holding Co., Inc.*, Judge Frank "seriously questioned whether foundation exists for Cobb's statements …" and excluded opinions from Cobb. No. 04-4048, 2006 WL 5159512, at *4 (D. Minn. May 8, 2006). Additionally, in *EZ Dock v. Schafer Sys., Inc.*, Judge Kyle again observed that Cobb's report and testimony was not supported by any facts or analysis and concluded that EZ Dock failed to meet its burden of proving that Cobb's proposed expert testimony satisfies the criteria of Rule 702. No. 98-2364, 2003 WL 1610781, at * 6 (D. Minn. Mar. 8, 2003). Furthermore, Cobb has admitted that his testimony has been excluded in a least one case involving professional malpractice claims against accountants based upon his lack of foundation. (Ex. 5, Cobb Dep., 82:21-83:21). As these cases all demonstrate, Cobb has more than once attempted to pass off his *ipse dixit* as expert opinion and his testimony has been properly excluded.

In summary, Cobb is not qualified as an expert regarding tax form preparation, including the specific forms at issue here, or the professional standards and duties that apply to that work. He has no relevant experience, education or training to allow him to render an expert opinion on liability or causation relating to the defendants' tax preparation activities and compliance with governing professional standards. Further, he cannot rely on any "corroboration" from Surdel to make his testimony admissible. *See*

US v. Gray Bear, 883 F.2d 1382, 1391 (8th Cir. 1989) (noting that Rule 703 does not allow an expert witness to circumvent the rules of hearsay by testifying that other experts corroborated his views). Cobb's testimony is therefore appropriately excluded under Federal Rule of Evidence 702.

3. Cobb's liability and causation views, which are based on his misapplication of AR § 100, are neither generally accepted nor reliable.

In the absence of any explanation or justification, Cobb generally bases his liability and causation views on his unfounded assertion that the defendants were required to comply with the AR § 100 in providing their tax preparation services to Miksic. (Ex. 5, Cobb Dep., 106:1-5). Cobb does this despite testifying that AR § 100 applies to professional audit and review services, and not professional tax services. (*Id.*, 105:4-22).

As noted by the defendants' expert, Todd Taggart, AR § 100 does not apply to the defendants' tax preparation services provided to Miksic. (Ex. 12, Taggart Report, p. 9). In his report, Taggart specifically states:

> Engagements for the compilation, review, and audit of financial statements are markedly different from those used for the preparation of tax returns and are subject to different standards. A financial statement engagement requires independence and the testing and verification of information.
>
> Tax preparers on the other hand, are advocates for their clients (SSTS No. 1, paragraph 4) and are not required to test and verify all information presented by their clients. "In preparing or signing a return, a [tax preparer] may in good faith rely, without verification, on information furnished by the tax preparer or third parties" (SSTS No 3, Paragraph 2).
>
> The inclusion of a standard related to financial statement preparation as a reference in the context of a tax return engagement is not correct and Cobb erred by including it.

(*Id.*).

When questioned during his deposition, Cobb concedes that many of his criticisms underlying his liability and causation views are generally based on his misapplication of AR § 100. For example, while Cobb criticizes the defendants for not being more aware of publically available information relating to Miksic, he admits that this level of inquiry is only required under AR § 100 and by common sense. (Ex. 14, Cobb Ex. 85, p. 30; Ex. 5, Cobb Dep., 195:24-197:20). Cobb further criticizes the defendants for not further investigating Miksic's background based upon the purported significance of Miksic's assets and relationship with the defendants, but again concedes this level of inquiry is not required under the SSTSs governing the defendants' tax preparation work. (Ex. 5, Cobb Dep., 197:13-198:13). Additionally, Cobb criticizes the defendants for not having face-to-face meetings with Miksic, but again admits that there is nothing in the SSTSs requiring such meetings. (*Id.*, 203:5-9).

Under Rule 702, the Court's primary concern is an expert's methodology, not his conclusions. *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2011). Nothing in Cobb's liability or causation views against the defendant are derived from any reliable or accepted application of AR § 100 to the performance of the defendants' professional tax services. Those services are governed by Circular 230 and the SSTSs. (Ex. 14, Cobb Ex. 85, p. 13; Ex. 12, Taggart Report, p. 5). Moreover, Cobb cannot legitimately argue that common sense allows him to hold the defendants to the requirements of AR § 100. As already noted by Judge Tunheim, while common sense and general background may be relevant to an expert's qualifications, they are not adequate methods or techniques for formulating specific opinions. *Khoday*, 93 F. Supp. 3d at 1081.

Cobb's use of AR § 100 to underpin and support his liability and causation views is done only through his say-so, which simply affirms Miksic's view of the evidence without adding any insight. Cobb's liability and causation testimony, which is generally based on his misapplication of AR § 100, is therefore properly excluded in its entirety. *See id.*; *see also Sanny v. Trek Bicycle Corp.*, No. 11-2936, 2013 WL 1912467, at *16 (D. Minn. May 8, 2013) (excluding *ipse dixit* expert testimony under Rule 702 because it was not supported by scientifically reliable or repeatable methods, and simply affirmed the plaintiff's view of the evidence).

B. Cobb's Testimony is Also Properly Excluded Under Federal Rule of Evidence 403.

In addition to lacking foundation, being totally unreliable and inadmissible under Rule 702, Cobb's testimony is also inadmissible on the alternative basis that it is founded on misleading interpretations of the AICPA's AR § 100 that would be confusing to the jury. As noted by Judge Kyle,

> As the Supreme Court highlighted in *Daubert*, a judge assessing a proffer of scientific testimony under Rule 702 should also be mindful of other applicable rules, including Federal Rule of Evidence 403, which permits the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. This is of particular concern with expert testimony, which can be both powerful and quite misleading because of the difficulty in evaluating it.

Werth v. Hill-Rom, Inc., 856 F. Supp. 2d 1051, 1067 (D. Minn. 2012) (internal quotations omitted). For this reason, this Court enjoys wider latitude than normal when determining whether an expert's testimony should be admitted. *Id.* ("Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 … exercises more control over experts than over lay witnesses"); *see also In re Puda Coal Securities Inc., Litig.*, 30 F. Supp. 3d 230, 255 (S.D.N.Y. 2014) (excluding the expert in a professional malpractice case because his "opinions run the very real risk of misleading the jury as to the applicable standard of care" for auditors, among other things).

It is not difficult to conceive that a jury would blindly accept Cobb's unsupported views while overlooking his lack of foundation or his misreading and misapplication of the AICPA standards, including AR § 100. Cobb's liability and causation views against the defendants are predicated solely on his uninformed views of professional tax preparation services and his misreading of the AICPA standards. Cobb admits that he has no tax preparation experience and, as a result, he has no experience in actually complying with the various AICPA standards. Therefore, he has no basis for any liability or causation opinion relating to the defendants' tax preparation work at issue in this litigation. Further, Cobb admits that he relies on AR § 100 to generally support his views even though that standard does not apply to the professional tax services the defendants provided to Miksic. There is simply nothing to support Cobb's views but his say-so and his unsupported testimony. This has great potential to confuse and mislead a jury and must be excluded under Rule 403. *See, e.g.*, *Werth*, 856 F. Supp. 2d at 1067 (finding that, based on the unreliable basis for the expert's opinion and its potential to mislead a jury, the court excluded expert testimony under Rule 403); *see also Fireman's Fund Ins. Co. v. Canon*, 394 F.3d 1054, 1060 (8th Cir. 2005) (affirming district court's decision to exclude expert testimony because it was based on misleading facts that would be confusing to a jury).

V. CONCLUSION

For the foregoing reasons, the defendants respectfully request that their Motion to Exclude the testimony of Plaintiff's expert, Arthur H. Cobb, be granted in its entirety.

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